

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

FEB -6 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2007-0320
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DOUGLAS PAUL PHILLIPS,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200500928

Honorable David M. Roer, Judge
Honorable Joseph R. Georgini, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
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H O W A R D, Presiding Judge.

¶1 Appellant Douglas Phillips challenges his four convictions for aggravated assault and single conviction for aggravated driving under the influence of intoxicating liquor. Phillips contends that his second trial was barred by the Fifth Amendment’s protection against double jeopardy and that the trial court erred in permitting testimony during the second trial concerning his exercise of the right to remain silent. For the following reasons, we affirm.

Facts and Procedural Background

¶2 “We view the facts and reasonable inferences therefrom in the light most favorable to sustaining the verdicts.” *State v. Siddle*, 202 Ariz. 512, ¶ 2, 47 P.3d 1150, 1152 (App. 2002). The state charged Phillips with five counts of aggravated assault, one count of aggravated driving under the influence, and one count of aggravated driving with an alcohol concentration of .08 or more.¹ Before his first trial, Phillips moved to preclude, inter alia, any testimony that he had used racial slurs while being questioned by sheriff’s deputies. The trial court granted this part of the motion. Additionally, Phillips moved to preclude testimony about statements made by a witness who was unavailable to testify at trial. The court also granted this motion.

¶3 During Phillips’s first trial, a sheriff’s deputy testified about statements made by the unavailable witness. Phillips objected based on the pretrial ruling. The same deputy

¹The trial court subsequently granted Phillips’s motion pursuant to Rule 20, Ariz. R. Crim. P., to dismiss one count of aggravated assault. The court also dismissed Phillips’s charge of driving with an alcohol concentration greater than .08.

later testified that he had heard Phillips utter racial slurs. Phillips again objected. The state asserted it was under the impression that the trial court had merely precluded testimony regarding a specific slur but had not precluded reference to the fact that slurs had been used. The trial court agreed with the state.

¶4 The next day, Phillips moved for a mistrial and dismissal of the case with prejudice, arguing the deputy's testimony violated the trial court's preclusion orders. The trial court played a recording of the motions hearing and found that both parts of the deputy's testimony indeed violated the court's orders. The court indicated, however, that it was unwilling to dismiss the charges with prejudice at that time. In response, Phillips withdrew his motion, noting that a mistrial without a dismissal of the case with prejudice would put him "in a worse position."

¶5 After his first trial, Phillips was convicted of four counts of aggravated assault and one count of driving under the influence. He subsequently filed a motion for a new trial and renewed his motion for a mistrial and dismissal of the charges with prejudice. The trial court denied the motion for mistrial as untimely but granted his request for a new trial. Phillips then filed a motion to dismiss the charges on double jeopardy grounds. The trial court denied the motion.

¶6 During Phillips's second trial, the court precluded testimony about statements Phillips made after he was taken into custody. A deputy nevertheless testified that Phillips had refused to answer questions and stated that "under Miranda[,] he had a right to refuse [to

answer questions] and he did.” At the end of his second trial, the jury again found Phillips guilty of one count of driving while under the influence and four counts of aggravated assault. This appeal followed.

Double Jeopardy

¶7 Phillips first argues that his second trial was barred by the Fifth Amendment’s protection against double jeopardy because “the State committed misconduct” during the first trial that forced him to “choose between starting anew or completing the trial infected by error.” “Whether double jeopardy bars retrial is a question of law, which we review de novo.” *State v. Moody*, 208 Ariz. 424, ¶ 18, 94 P.3d 1119, 1132 (2004). But we review a trial court’s decision whether to dismiss an indictment on double jeopardy grounds for an abuse of discretion. *Miller v. Superior Court*, 189 Ariz. 127, 129, 938 P.2d 1128, 1130 (App. 1997); *see also State v. Korovkin*, 202 Ariz. 493, ¶ 5, 47 P.3d 1131, 1133 (App. 2002) (reviewing trial court’s decision on whether to dismiss prosecution with prejudice for abuse of discretion).

¶8 After his first trial, Phillips moved to dismiss on double jeopardy grounds because of alleged “[s]tate misconduct.” But Phillips had previously withdrawn a motion for mistrial based upon the same “misconduct by the State.” The supreme court has stated:

Traditionally, this court has extended double jeopardy protection based on prosecutorial misconduct only to cases in which the defendant moves for mistrial on those grounds. *See Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984) (holding that “jeopardy attaches under art. 2, § 10 of the Arizona Constitution when a mistrial is granted” and

other specified conditions are met); *see also State v. Jorgenson*, 198 Ariz. 390, 392, ¶ 7, 10 P.3d 1177, 1179 (2000) (extending *Pool* to cases in which the mistrial motion was meritorious and should have been granted). . . .

. . . .

This court has never reviewed a double jeopardy claim based on prosecutorial misconduct if the defendant had not previously moved for mistrial or sought relief by special action from the trial court's denial of his motion to dismiss on those grounds.

Moody, 208 Ariz. 424, ¶¶ 20, 23, 94 P.3d at 1132, 1133.

¶9 Phillips withdrew his motion for mistrial during the first trial and allowed the case to proceed to a jury verdict. Phillips cannot withdraw his objection to alleged misconduct, take his chances at trial, and then seek appellate relief for an unfavorable result. *See State v. Valdez*, 160 Ariz. 9, 13-14, 770 P.2d 313, 317-18 (1989), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). And Phillips's second motion for mistrial came after the first trial was completed and was untimely. *See State v. Atwood*, 171 Ariz. 576, 641, 832 P.2d 593, 658 (1992) (because defendant failed to object to evidence when admitted and instead moved for mistrial later, motion for mistrial not timely), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001); *State v. Harris*, 157 Ariz. 35, 36, 754 P.2d 1139, 1140 (1988) (contemporaneous objection required so court can remedy objectionable action; party cannot permit error to go unrectified and later seek mistrial); *State v. Puryear*, 121 Ariz. 359, 362, 590 P.2d 475, 478 (App. 1979) (objection untimely when defendant failed to notice error earlier and object

then). Thus, Phillips's motion was similar to the motion to dismiss in *Moody*, which the supreme court found had failed to preserve the double jeopardy issue. *See Moody*, 208 Ariz. 424, ¶¶ 19, 23, 94 P.3d at 1132, 1133. Under *Moody*, we need not review Phillips's double jeopardy claim.²

¶10 Moreover, even if Phillips's withdrawal of his motion for a mistrial did not waive his claim of state misconduct or if his successful motion for new trial somehow preserved it, his second trial was still not barred on double jeopardy grounds. The Double Jeopardy Clause protects a criminal defendant's "right to be free from multiple trials." *Jorgenson*, 198 Ariz. 390, ¶ 6, 10 P.3d at 1178. Although a "defendant ordinarily waives that right when he seeks a new trial because of error in the original trial, the clause applies when the need for a second trial is brought about by the state's egregiously intentional, improper conduct." *Id.* Prosecutorial misconduct sufficient to implicate double jeopardy "[can]not merely [be] the result of legal error, negligence, mistake, or insignificant impropriety," however, and must instead amount to "intentional conduct which the prosecutor knows to be

²We also note Phillips has not argued that fundamental error occurred. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not asserted). By withdrawing his motion for mistrial based on prosecutorial misconduct, Phillips waived any objection to the state's alleged misconduct absent fundamental error. *See State v. Moraga*, 98 Ariz. 195, 200, 403 P.2d 289, 293 (1965) (withdrawing motion for mistrial waives any objection on appeal to proceedings giving rise to motion). And the defendant, not the state, has the "burden of persuasion in a fundamental error review." *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Accordingly, Phillips's double jeopardy claim necessarily fails because it is predicated upon his waived claim of prosecutorial misconduct.

improper and prejudicial, and which he pursues for any improper purpose.” *Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72.

¶11 In *Pool*, our supreme court found that the prosecutor had engaged in “abusive, argumentative and harassing conduct” that “he knew to be improper.” *Id.* at 103, 109, 677 P.2d at 266, 272. The prosecutor discussed the defendant’s handling a gun while intoxicated and referred to the defendant’s drinking habits. *Id.* at 102, 677 P.2d at 265. He also repeated questions to which objections had been sustained and characterized the defendant as a “‘cool talker,’ a knowledgeable witness and a ‘good buddy’ of defense counsel”—a trial strategy the court determined to be “grossly improper and designed to raise prejudice in jurors.” *Id.* at 102-03, 677 P.2d at 265-66. The prosecutor also repeatedly asked improper questions calling for pure speculation. *Id.* at 103, 677 P.2d at 266. The *Pool* court concluded that the prosecutor’s conduct during trial was not “simply erroneous, negligent or mistaken” but rather that the prosecutor had “intentionally engaged in conduct which he knew to be improper,” and had done so “with indifference, if not a specific intent, to prejudice the defendant.” *Id.* at 109, 677 P.2d at 272. Accordingly, the *Pool* court held that “jeopardy attached and retrial [was] barred.” *Id.*

¶12 The prosecutorial misconduct in this case, if it can even be characterized as misconduct, is nothing like that in *Pool*, where the prosecutor intentionally and deliberately “injected error in the first trial in order to force the defendant to request a mistrial.” *State v. Detrich*, 178 Ariz. 380, 385, 873 P.2d 1302, 1307 (1994). Here, the improper testimony was

not the result of any intentional misconduct by the prosecutor and instead stemmed from the behavior of a witness. Phillips's own attorney stated that the prosecutor "did his job" and did not engage in intentional misconduct or do "anything wrong." And later the trial court also found that no misconduct had occurred.

¶13 Phillips argues, however, that, even if the prosecutor did not engage in misconduct, the "State committed misconduct" when the "witness . . . testified to the things he was not supposed to testify to." But, as we have already noted, the double jeopardy clause is not implicated unless "the need for a second trial is brought about by the state's egregiously intentional, improper conduct." *Jorgenson*, 198 Ariz. 390, ¶ 6, 10 P.3d at 1178. The trial court itself at first did not recall having precluded testimony that Phillips had made racial slurs. The sheriff's deputy testified that he had not been fully informed of the court's preclusion orders and did not intentionally violate the order precluding certain testimony. And the prosecutor also stated that he had not made the court's preclusion instructions "clear enough" for the witness. Therefore, even assuming that the Fifth Amendment analysis articulated in *Jorgensen* and *Pool* applied to the deputy's statements during the first trial, the Double Jeopardy Clause did not bar Phillips's retrial because the record does not demonstrate the deputy's conduct was intentional. And even if the deputy's testimony could be characterized as intentional, it nonetheless did not rise to the level of egregiousness described in *Pool*. Accordingly, we find that Phillips's second trial was not barred by the Double Jeopardy Clause.

***Miranda* Violation**

¶14 Phillips also contends the state erred when it allowed a sheriff's deputy, who testified at the second trial, to state that Phillips had invoked his right to remain silent. But, as the state points out, Phillips did not object to this testimony below and has, therefore, forfeited all but fundamental error review. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Siddle*, 202 Ariz. 512, ¶ 4, 47 P.3d 1150, 1153 (App. 2002). The defendant, and not the state, has the "burden of persuasion in fundamental error review." *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶15 Although the deputy's statement that Phillips had invoked his *Miranda* rights was improper, *see State v. Palenkas*, 188 Ariz. 201, 210, 933 P.2d 1269, 1278 (App. 1996), Phillips did not object to it below and on appeal does not argue that it was fundamental error. Therefore, he has waived the argument and we need not address it further. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not argued). Moreover, overwhelming evidence was presented at trial to establish that Phillips committed the offenses charged. Given this evidence, even if Phillips had not waived his fundamental error argument on appeal, he still could not establish that the deputy's comments resulted in prejudice. *See State v. Gallegos*,

178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994) (defendant cannot establish prejudice in fundamental error review when there is overwhelming evidence of defendant's guilt).

Conclusion

¶16 In light of the foregoing, we affirm Phillips's convictions and sentences.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge